

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

IN AND FOR UTAH COUNTY, STATE OF UTAH

PROVO RESERVOIR COMPANY  
A Corporation,

Plaintiff :

vs

PROVO CITY, ET AL

Defendants :

No. 2888 Civil

PETITION FOR ORDER TO SHOW CAUSE

The Petition of Caleb Tanner respectfully shows to the Court:

1. That on or about the <sup>22d</sup>~~22d~~ day of <sup>August</sup>~~September~~, 190<sup>7</sup>~~7~~, one Jens C. Jensen made and entered into a certain contract and agreement with the Provo Reservoir Company, a corporation, a copy of which said contract is attached hereto and marked "Exhibit A".

2. That subsequent to the execution of said contract marked "Exhibit A", said Jens C. Jensen did and performed any and all things required by him to be performed thereunder, and on or about the 29th day of November, 1918, said Provo Reservoir Company made, executed and delivered to said Jens C. Jensen, a certain deed for water right, a copy of which is attached hereto and marked "Exhibit B".

3. That on or about the 22d day of September, 1911, said Jens C. Jensen made and entered into a certain contract and agreement with the Provo Reservoir Company, a corporation, copy of which is attached hereto and marked "Exhibit C".

4. That subsequent to the execution of said contract marked "Exhibit C", said Jens C. Jensen did and performed any and all things required by him to be performed thereunder, and on or about the 29th day of November, 1918, said Provo Reservoir Company made, executed and delivered to said Jens C. Jensen, a certain deed for water right, a copy of which is attached hereto and marked "Exhibit D".

5. That on or about the 28th day of December, 1912, the Provo Reservoir Company, a corporation, made, executed and delivered to said Jens C. Jensen, certain deed for water right, copy of which is attached hereto and marked "Exhibit E".

M. R. STRAW  
COMMERCIAL BANK BUILDING  
PROVO, UTAH

6. That that particular contract hereinabove set out as "Exhibit A" was recorded in the office of the County Recorder of Utah County, Utah, in book 108, of Mortgages, at page 305 thereof, on or about the 16<sup>th</sup> day of Aug 1909.

7. That that particular contract hereinabove set out as "Exhibit C" was recorded in the office of the County Recorder of Utah County, Utah, in book 126 of Mortgages, at page 690 thereof, on or about the 25<sup>th</sup> day of Sept 1911.

8. That the said Preambles and Resolutions of said Provo Reservoir Company referred to in said deeds for the year 1909, contains the following provision, to-wit:

"Whereas, Provo Reservoir Company, a corporation, is the owner of certain water rights and applications to appropriate waters for irrigation purposes, described in its Articles of Incorporation, and intends to secure other water rights and interests in addition thereto; which appropriations, rights and interests it proposes to utilize for the purpose of furnishing a more adequate supply of water with which to irrigate the lands described in the applications to appropriate water for irrigation, etc., above referred to, together with other lands that are capable of irrigation, with waters from Provo river, known as the Provo River System; and whereas, in order to hold said water rights and applications to appropriate waters, it is by law required that the waters applied for and thereby covered, be utilized for the irrigation of the lands described in the said applications therefor; and whereas, in some of the applications for said appropriations, large areas of land upon which it is intended to use said waters, are described; and whereas, persons and parties, other than this corporation, own the land so described, and upon which it is intended to use said waters, it becomes necessary, in order to apply said water upon said lands, that this company as the owner and holder of said water rights, and the owners of said lands upon which it is to be used, enter into agreements and stipulations, specifying the terms and conditions upon which said land owners will purchase and utilize said waters;"

9. Said Preamble for the year 1909 following that part thereof hereinabove quoted, further contains the following:

"Therefore be it Resolved, That this Company, by and through its President, is hereby authorized and empowered on behalf of and as the act and deed of this corporation to enter into contracts in writing with such of the owners of the lands described in said applications and the owners of such other lands as may be irrigated from said system, as will subscribe for water rights under any of the rights, or applications now owned and held by this Company and any other rights, appropriations, or interests which said Company may hereafter acquire, to waters for said system."

10. Said Preamble for said year 1909 further contains the following provision:

"In order to convey the waters from the several points of diversion named in said applications, and from the points where the Company has or may acquire rights, the Company shall build a substantial canal system, consisting of reservoirs, earthen or concrete canals, concrete or other substantial flumes, tunnels, and wood or steel pipes, for the purpose of storing and conveying said waters to a point located near the center of Section 12, in Township 6 South, of Range 2 East, of Salt Lake Meridian, to be known as the point of General Delivery."

"The Company agrees, that when the said contract price for any of the said water rights and the water rates hereinbefore provided for shall have been fully paid, and the conditions by the Consumer covenanted to be performed, have been complied with, it will execute to and in favor of said Consumer, his heirs and assigns, a deed, conveying to him, or them, the said water right, together with such pro rata interest in said system as his interest in said water rights shall represent; and thereafter, as to him, the annual rates for maintenance and repair of the system hereinbefore provided for, shall cease, and he shall become an owner in fee simple of an undivided interest in said system to the extent of the ratio which the number of acres and class of right purchased or acquired by him shall at such time or at any subsequent time bear to the entire number of acres and class supplied with water from said system."

"The Company reserves the control, management, operation and regulation of the said system until January 1st, 1920, after which time, such control, etc., shall be exercised by those interested in proportion to their respective interests,."

11. That the ~~General~~ Preamble and Resolutions of said Provo Reservoir Company for the year 1911 referred to in "Exhibit D", contains a provision identical with that part of the Preamble for the year 1909 hereinabove set forth in paragraph 8 hereof.

12. That the Preambles and Resolutions of said Provo Reservoir Company for the year 1911, so referred to in said deed, copy of which is marked "Exhibit D", contains the following further provisions:

"THEREFORE BE IT RESOLVED, That this Company, by and through its President or Vice-President, thereunto hereby authorized, enter into contracts in writing with such of the owners of the lands described in said applications and the owners of such other lands as may be irrigated from said system, as will subscribe for water rights under any of the rights, or applications now owned and held by this Company and any other rights, appropriations or interests which said Company may hereafter acquire, to waters for said system."

"The Company agrees, that when the said contract price for any of the said water rights and the water rates hereinbefore provided for, shall have been fully paid, and the conditions by the Consumer, covenanted to be performed, have been complied with, it will execute to and in favor of said Consumer, his heirs and assigns, a deed, conveying to him, or them, such pro rata interest in said system as his (or their) interest in said water rights shall represent; and he (or they) shall become owner (or owners) in fee simple of an undivided interest in said system to the extent of the ratio which the number of acres and class of right purchased or acquired by him (or them) shall at such time or any subsequent time bear to the entire number of acres and class supplied with water from said system. Provided: That if such payment be made and such deed be issued prior to the 1st day of January, A. D. 1920, it shall not become operative absolutely until after said date, and the annual rates for maintenance and repair of the system hereinbefore provided for shall continue until the said 1st day of January, A. D. 1920."

"The Company reserves the full and complete control, management, operation and regulation of the said system until January 1st, 1920, after which time such control, etc., shall be exercised jointly by the Company and those interested in proportion to their respective interests."

13. That pursuant to the said Preambles and Resolutions of the said Provo Reservoir Company for the years 1909 and 1911, said Provo Reservoir Company constructed an irrigation system consisting of canals, reservoirs, flumes, tunnels, and pipes, for the purpose of conveying the

waters by it so deeded to the said Jens C. Jensen and other holders of similar contracts and deeds to the point of general delivery mentioned in said Preambles and Resolutions, to-wit:

"To a point near the center of Section 12, Township 6 South, Range 2 East, of the Salt Lake Base & Meridian in Utah County, Utah;"

And said Provo Reservoir Company further constructed a canal extending from a point in Provo Canyon known as Heiselt's in Utah County, Utah, down said Provo Canyon on the southerly side thereof to the mouth of said canyon, thence west across Provo River and on to the Bench on the westerly side of said Provo River near the mouth of said canyon to a point approximately the center of Section 12, Township 6 South, Range 2 East, Salt Lake ~~Base~~ <sup>Base and</sup> Meridian, said point being the point of general delivery referred to in the said Preambles and Resolutions of said Provo Reservoir Company for the years 1909 and 1911; that said Provo Reservoir Company entered upon the duty of making delivery of the waters represented by the said deeds at the center of said section 12 for the use and benefit of said Jens C. Jensen and for the use and benefit of persons owning water rights in said system under similar contracts and conveyances.

14. That on or about the 1st day of January, 1920, the said Provo Reservoir Company relinquished the control of the said irrigation system so by it constructed, to a committee constituted by the users of the waters of said system, which said committee was known as the Board of Control; that said Board of Control continued until about July 2d, 1924, to distribute the waters of said irrigation system so constructed by said Provo Reservoir Company during the irrigation season of said year.

15. That about the said 2d day of July, 1924, certain of the holders of deeds of said Provo Reservoir Company, similar to the deeds so made to the said Jens C. Jensen, copies of which are attached hereto, and the said Provo Reservoir Company organized a corporation known as Provo Reservoir Water Users Company, and said corporation since its organization has attempted and assumed to distribute and now attempts to distribute the waters of said irrigation system and said Provo Reservoir Company and said Provo Reservoir Water Users Company now assume to direct T. F. Wentz river commissioner hereinafter referred to in the dis-

tribution of all of the waters in the said Provo River irrigation system and the said T. F. Wentz, as such commissioner, now assumes said Provo Reservoir Company and said Provo Reservoir Water Users Company have the right to direct the distribution of the waters so granted to the said Jens C. Jensen by the said Provo Reservoir Company in the said deeds, copies of which are attached hereto; that said Provo Reservoir Company has heretofore disclaimed any right or duty in connection with the distribution of said waters; that neither said Jens C. Jensen nor this petitioner has assigned to the said Provo Reservoir Water Users Company the said water rights represented by the said deeds, copies of which are attached hereto, neither has the said Jens C. Jensen nor this petitioner in any manner authorized said Provo Reservoir Water Users Company to distribute said waters represented by the said deeds; that said Provo Reservoir Water Users Company has no property in the said irrigation system of the said Provo Reservoir Company or in the said canal so constructed as in paragraph 13 hereof alleged except such interests as have been transferred to it by the owners of water rights in the said Provo Reservoir Company's irrigation system <sup>and</sup> ~~or~~ such rights as have been conveyed to it by the said Provo Reservoir Company.

16. That on or about the 3d day of March, 1925, by his good and sufficient deeds made, executed and delivered to petitioner the said Jens C. Jensen, grantee in Exhibits "B", "D", and "E", duly and regularly sold and transferred to this petitioner all right, title and interest in and to the said waters and water rights, together with all other rights represented by the said deeds so made to the said Jens C. Jensen, and that the petitioner at all times since the said 3d day of March, 1925, has been and now is the owner of said water rights and entitled to the use thereof and is the owner of and entitled to the use of any and all <sup>privileges</sup> ~~rights~~ in connection therewith.

17. That petitioner has not conveyed to said Provo Reservoir Water Users Company the said water rights so by said Jens C. Jensen deeded and transferred to him but is now and at all times since the 3d day of March, 1925, has been the owner thereof and at all times since the said 3d day of March, 1925, has been and now is a joint owner of the said irrigation system so made and constructed by the said Provo Reservoir Com-



pany as hereinabove stated, and at all times since the 3d day of March, 1925, petitioner has been a joint owner of the said canal constructed in said Provo Canyon as herein in paragraph 13 alleged and petitioner is now a tenant in common in said canal and is a tenant in common of any and all interests in said irrigation system as so constructed by the said Provo Reservoir Company.

18. That under said contracts and deeds, copies of which are attached hereto and marked Exhibits "A", "B", "C", "D", and "E", petitioner became and now is a tenant in common and joint owner with others of the said canal and irrigation system and has a right to convey therein the waters represented by the said deeds, copies of which are attached hereto and marked Exhibits "B", "D", and "E", from the said Provo River down said canal to the said point of general delivery mentioned in the said Preambles and Resolutions hereinabove referred too to-wit:

"To a point near the center of Section 12, Township 6 South, of range 2 East, S.L.M. in Utah County, Utah."

And Petitioner as such tenant in common has a right to the use of any unused capacity in the said canal.

19. That petitioner has heretofore rented to water users taking water from the said canal at about the center of Section 12, Township 6 South, Range 2 East, S.L.M., the twenty and one third acres of water represented by the said deeds, copies of which are attached hereto and marked Exhibit "B", "D", and "E" for the irrigation season of 1925; that the lands upon which said rented waters are to be used are barren and nonproductive without irrigation, but with irrigation produce abundant crops; that the said waters represented by said deeds have been rented for use through the Iona lateral of said irrigation system to the following named persons in shares as stated to wit:

William Burr	nine and one third primary acres
J. D. Gatenby	six primary acres
Willard Bishop	five primary acres

that said persons so renting said waters are dependent after the high water period on the use of the said rented waters for the irrigation of their said lands; that at all times after high water season, which closes for 1925 will probably close generally between the dates of May 30th and June 15th, there is and in the year 1925 will be, an unused capacity in the said canal, particularly described in paragraph 13 hereof, to convey sufficient water to the said lessees of the twenty and one third acres of water for the year 1925 and there will be an un-

sufficient said  
used capacity in said canal) to convey ~~sufficient~~ waters to petitioner's  
said lessees from the intake of the said canal' in said Provo Canyon to  
the center of said Section 12, Township 6 South, Range 2 East, S.L.M.

20. THAT petitioner is the owner of the rights to the use of waters as represented by the said deeds, copies of which are attached hereto ~~and~~ is the owner of capacity in said canal and the right to flow said waters through same to the said point of general delivery.

21. That petitioner, as such owner, now is and he and his predecessor in interest have been subject to the requirements of law and the said contracts, copies of which are attached hereto, with reference to the payment of a pro rata of the cost of distribution of the said waters represented by said deeds and petitioner offers to pay any just pro rata of the cost and expense of distribution of said waters through said canal.

22. That the final decree in judgment awarded in the above entitled action, Civil No. 2888, in the above entitled Court, awarded 2.52 second feet of water to one John D. Dixon; that Plaintiff is the assignee of the said 2.52 second feet of water, that said water is transferred water as defined in subdivission "A" of paragraph 87 of said final decree; that the petitioner as the owner thereof has a right to divert said 2.52 second feet over the Olmstead dam in Provo Canyon and to divert said 2.52 second feet of water from Provo River at a point near the mouth of Provo Canyon; that <sup>substantially</sup> .2 of a second foot of water will supply petitioner's lessees of the said 20 1 3 acres for the year 1925.

23. That the Court in the above entitled action has heretofore appointed one T. F. Wentz as water commissioner for the purpose of distributing the waters awarded by said decree; that the above entitled Court has reserved jurisdiction herein for the purpose of administering the distribution of the waters of said Provo River through and by the said commissioner; that the waters represented by the said deeds, copies of which are attached hereto and marked Exhibits "B", "D", and "E", were and are waters awarded under the said final judgment and decree rendered in the above entitled action, Civil No. 2888.

24. That petitioner has heretofore demanded of said T. F. Wentz as such commissioner, the delivery from Provo River into the said main canal herein in paragraph 13, described of the said twenty and one third acres of primary water granted by the said deeds, copies of which are attached hereto for the use of petitioner's renters of said water for the season 1925, that said T. F. Wentz has failed, neglected, and refused to turn said waters into the said canals for the use of said petitioner and the said assignees through the said Iona lateral, and the said T. F. Wentz as such commissioner, wrongfully and without right, and contrary to his duty in the premises, now refuses to turn said twenty and one third acres of primary water right, or any part thereof, or any water whatsoever, into said canal for the plaintiff's use, and said T. F. Wentz, commissioner, alleges that Provo Reservoir Company, a corporation; and Provo Reservoir Water Users Company, a corporation; and R. J. Murdock as Secretary thereof, claim a right to dictate the disposition and distribution of said waters and petitioner alleges that neither said Provo Reservoir Company nor Provo Reservoir Water Users Company, nor R. J. Murdock has the right to direct the use or disposition of said water in any particular whatsoever.

25. That this petitioner has heretofore requested the said T. F. Wentz as such commissioner to turn into Provo River and into the said main canal of the Provo Reservoir Company described in paragraph 13 hereof, .2 of one second foot of the 2.52 second feet of water awarded in paragraph 82 of said final decree of the Court in Civil Action No. 2888 in this Court for the use and benefit of Petitioner's lessees of the said twenty and one third acres of primary water right for the year 1925, but that said T. F. Wentz has failed, neglected and refused to comply with such request; petitioner further alleges that .2 of one second foot of water will supply petitioner's lessees in the said Iona lateral.

26. That petitioner has no knowledge as to the exact number of acres of primary water right which the said Provo Reservoir Company has heretofore sold and disposed of, and petitioner cannot acquire such information; that petitioner has heretofore requested such information from Provo Reservoir Company and Provo Reservoir Water Users Company, and such corporations have refused to give petitioner such information. Petitioner



cannot, therefore, state with any greater degree of accuracy, what proportion of the waters of the Provo <sup>Reservoir Company's</sup> ~~River~~ Provo River irrigation system petitioner is entitled to the use of, but alleges on information and belief that said Provo Reservoir Company has such information and that said Provo Reservoir Water Users Company and Provo Reservoir Company have possession of the records showing the total number of primary acres of water right disposed of by the said Provo Reservoir Company, and petitioner alleges that he is the owner and entitled to the use of such proportion of any and all waters in said Provo River irrigation system heretofore owned by Provo Reservoir Company as said twenty and one third acres bears to the total number of acres of primary water right disposed of by the said Provo Reservoir Company

WHEREFORE, petitioner prays that the above entitled Court make and enter its order to show cause herein directing T. F. Wentz, Commissioner, to show cause before the above entitled Court on a day certain, if any he may have, why he should not divert said twenty and one third acres of primary water right represented by the deeds, copies of which are attached to this petition, from the said river into the said main canal of said Provo Reservoir Company for the use of petitioner's assignees of said water right for the season 1925, or in the alternative, why he should not divert from the waters of Provo River into the main canal of said Provo Reservoir Company, .2 or one second foot of water for the use and benefit of petitioner's assignees of the said twenty and one third acres of primary water right for the irrigation season of 1925 as soon during the irrigation season of 1925 as there shall be an unused capacity in the said main canal of said Provo Reservoir Company described in paragraph 13 hereof.

That the above entitled Court issue its order directing said Provo Reservoir Company and said Provo Reservoir Water Users Company to be and appear before the above entitled Court at the time of the hearing of the order herein directed to said T. F. Wentz, as such commissioner, and bring with them accurate information and the records showing the total number of acres of primary water right heretofore issued by the said Provo Reservoir Company in the said Provo River irrigation system.

That upon the hearing of such order to show cause and when

the Court shall be fully advised in the premises the Court shall make and enter its order herein directing the said T. F. Wentz as commissioner to divert from Provo River into the said main canal of Provo Reservoir Company hereinabove described, the twenty and one third acres of primary water right owned by this petitioner for the use and benefit of petitioner's assignees of said water rights for the year 1925 as herein in this petition set forth, or in the alternative if the Court fails to make such order that said T. F. Wentz as such commissioner be required by the Court to divert from said Provo River and into the main canal of said Provo Reservoir Company, .2 of one second foot of the waters owned by said petitioner herein decreed in paragraph 82 of the final decree of the Court in the above entitled action, Civil No. 2888, and that said order further require the said Provo Reservoir Company and the said Provo Reservoir Water Users Company to permit such delivery of said waters and to petitioners said lessees and restrain said Provo Reservoir Company and said Provo Reservoir Water Users Company from any interference therewith.

That the Court prescribe the notice to be given of the hearing of this petition and make such order as the Court shall deem meet in the premises as to the parties to be served with a notice of the filing of this petition and hearing thereof.

Caleb Tanner  
Petitioner

STATE OF UTAH )  
                  ) ss  
COUNTY OF UTAH)

Caleb Tanner, being first duly sworn, deposes and says that he is the petitioner named in the above and foregoing petition, that he has read the same and knows the contents thereof and that the same is true of his own knowledge, except as to matters and things therein stated on information and belief, and as to such matters he believes it to be true.

Caleb Tanner

Subscribed and sworn to before me this 22nd day of May, 1925,



M. R. Straw

Notary Public Provo, Utah

My Commission Expires Mar. 8, 1929

~~Residing over Utah~~